UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 01-10122-RWZ

UNITED STATES OF AMERICA

v.

SHANE O'HEARN and PHILLIP WATSON

MEMORANDUM OF DECISION

July 9, 2004

ZOBEL, D.J.

This old case has had a long and convoluted history, including a change of trial judges. Finally, on June 18, 2004, trial of the two remaining defendants was scheduled to commence on July 12, 2004. On July 1, the government moved to continue the trial for an undefined period of time because an "essential" witness had been deported by Immigration and Customs Enforcement and had thus become "unavailable." When it filed the motion, the government did not know where the witness was, whether he could be found and, if he was found, whether he could be returned for trial or his testimony obtained by other means. At the hearing on the motion, the government informed the Court that the witness had been located but was unwilling to return to the United States. Although the government urged a continuance to obtain the witness' testimony, the means for doing so, the admissibility of such testimony, and the length of time necessary to obtain it were left murky at best.

At the close of the hearing, I denied the motion to continue subject to reconsideration if the government could provide better answers to the unanswered

questions. The government has now filed a further memorandum citing cases that deposition testimony is, under certain circumstances, admissible in a criminal trial. However, none of the cases provides any certainty as to the admissibility of such testimony in this trial. See, e.g., United States v. Salim, 855 F.2d 944, 952 (2d Cir. 1988) ("As was demonstrated in this case, the parties and the court may not always know beforehand just what type of examination a foreign nation may permit the attorneys to conduct."). Furthermore, the cases concerning Italian process do not establish that depositions taken in Italy will comply with all Sixth Amendment concerns. United States v. Drogoul, 1 F.3d 1546, 1554-55 (11th Cir. 1993)(noting that "if admission of the [Italian] deposition would violate the Sixth Amendment, the court could – indeed should – exclude the deposition.").[1]

I now reaffirm the denial of the motion for a continuance for the following reasons:

1. This case is more than three years old. The indictment was returned on April 12, 2001.

2. There is a strong possibility that the Speedy Trial time has run since at least 78 days of unexcluded time appear on the record.

3. The problem, namely, the absence of the witness, was created by the inexcusable negligence of an agency of the government, albeit not the U.S. Attorney's Office. This calls into question the "unavailability" of the witness.

---

[1] The government also cites United States v. Sindona, 636 F.2d 792 (2d Cir. 1980), which is distinguishable for two reasons: (1) there the only issue was the unavailability of the witnesses – not the form of the depositions, and (2) the procedural posture was wholly different since the court was reviewing the trial court's admission of deposition testimony for abuse of discretion.

4. It will likely take at least 6 to 12 months to obtain the testimony of the witness. The Declaration of AUSA James Herbert states that "we should be prepared for the possibility that [the deposition] might slip to November or even December." (Decl. of AUSA James Herbert at ¶ 3). This projected, lengthy delay itself militates against allowance of the government's motion. Dickey v. Florida, 90 S.Ct. 1564, 1577 (1970) ("The speedy-trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions.").

7/9/04
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE